

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 2616 of 1997****For Approval and Signature:****HON'BLE SMT. JUSTICE ABHILASHA KUMARI**

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1 Whether Reporters of Local Papers may
be allowed to see the judgment ?

2 To be referred to the Reporter or not
?

3 Whether their Lordships wish to see
the fair copy of the judgment ?

Whether this case involves a
substantial question of law as to the
4 interpretation of the constitution of
India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the
civil judge ?

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MERANBEN ALABELIBHAI NAGORI - Petitioner(s)

Versus

JAIL SUPERINTENDENT & 2 - Respondent(s)

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Appearance :

Mr.Sunil Mehta for MR SK BUKHARI for Petitioner(s) :

1,

Ms.Krina P.Calla, learned AGP for Respondent(s) : 1 -

2.

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CORAM : HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 02/03/2007

ORAL JUDGMENT

1. This petition has been filed by the petitioner i.e. Meranben Alabelibhai Nagori under Article 226 of the Constitution of India with the prayer to issue a writ of mandamus or any other appropriate writ or order directing the respondents to absorb the petitioner on a permanent basis as Matron, Sub Jail, Surendranagar with all consequential benefits and further, to declare the impugned action of the respondent No.1 in orally relieving the petitioner from the post of Matron, Sub Jail, Surendranagar as illegal, arbitrary and violative of Articles 14 and 311 of the Constitution of India.

2. By amendment effected as per the order of the Court dated 28-2-2001 the petitioner has further prayed for quashing and setting aside the order dated 8-1-2001 passed by respondent No.1 annexed at Annexure "E" to the petition whereby the respondents have not selected the petitioner as Matron since she did not fulfil the eligibility criteria regarding age and, order dated 9-1-2001 annexed at Annexure "F" to the petition whereby the services of the petitioner have been terminated.

3. Briefly stated, the facts as narrated in the writ petition are that the petitioner submitted an application to be appointed as Matron for lady prisoners in the Sub Jail at Surendrangar on 15-1-1983 through the Employment Exchange. It is the case of the petitioner that after being called for an interview she was appointed on a purely temporary basis as Matron for the lady prisoners at the Sub Jail at Surendranagar. The appointment order of the petitioner dated 13-5-1983 is annexed at Annexure "B" to this petition. According to the averments made in the petition, the petitioner performed the duties of Matron at the Sub Jail at Surendranagar with effect from 13-5-1983, as and when the lady prisoners were brought to the Jail, and she continued to work upto 31-3-1997, on which date her services were orally terminated by the respondent No.1, relieving her from duty with immediate effect. The petitioner has, therefore, challenged this action of the respondents by way of the present petition.

4. This Court (Coram:Ms.R.M.Doshit,J) vide order dated 9-5-1997 issued rule and directed as under:

"In the circumstances, by way of interim

order, it is directed that the petitioner may be called upon to make an application for regular selection to the post of matron. The petitioner, if found suitable, be appointed as a matron on the post created by the State Government. In the meanwhile the petitioner shall be continued as a temporary matron and be given suitable posting at any jail in the State. Posting order as directed hereinabove shall be issued within a period of two weeks from today. Direct service is permitted."

5. Pursuant to the above directions of the Court, the petitioner made an application and was called for an interview for the process of regular selection for the post of Matron, on 12-12-1997. The Selection Committee found that the petitioner was over-age since, as per the eligibility criteria stipulated for the post of Matron vide Notification dated 1-7-1981, the age of the candidate should be not less than 21 years and not more than 40 years of age. As the petitioner was over 40 years of age, she was not selected for the post of Matron. Further, the services of the petitioner were terminated vide order dated 9-1-2001.

6. An affidavit-in-reply has been filed by Mr.L.N.Nayee, Superintendent, Sub Jail, Surendranagar on behalf of respondent No.1 on 9-5-1997. It is stipulated therein that the appointment of the petitioner has been made in exercise of powers conferred under Clause 259 of the Bombay Jail Manual, which reads as under:

“259. He has authority to sanction the employment of extra establishment in any prison in case of urgent necessity (Serial No.79(6)(7) and (8) of F.P.No.VII): Provided Government sanction for the continuance of the staff beyond one year is obtained.”

7. The petitioner was called for work as and when lady prisoners were present in the Sub Jail. Therefore, as provided in the appointment letter, the services of the petitioner could be discontinued without any notice, since there was no regular or temporary post of Matron sanctioned by the Government or the competent authority. It is emphasised in the reply that the appointment of the petitioner was made on a purely temporary basis and since there was no sanctioned post, the process of selection for a

regular candidate would be carried out in accordance with the prescribed procedure, by calling for names from the Employment Exchange and after screening by the Selection Committee when such post became available. The appointment of the petitioner was made purely as a stop-gap arrangement and, therefore, the services of the petitioner cannot be regularised, and have rightly been terminated.

8. A second affidavit-in-reply has been filed by Mr.B.K.Vaghela, Superintendent, Sub Jail, Surendranagar on 3-3-2005, which is also on the same lines. However, it is stipulated therein that the Government of Gujarat, vide letter dated 5-11-1996 created 8 permanent posts of Matron and sanction was given to fill up the said posts. A Selection Committee was convened in the office of the Inspector General of Prisons and an interview for filling up the said posts was held on 12-12-1997. The name of the petitioner was at Sr.No.4 of the list of candidates. The petitioner participated in the selection process before the Selection Committee but was not found fit for appointment to the post of Matron because she was over the age limit of 40 years,prescribed as per Rules. Therefore, she was

declared unfit and was not selected. It is further stated in the reply-affidavit that the qualifications for the post of Matron are prescribed in the Notification dated 1-7-1981 issued under Article 309 of the Constitution of India whereby the candidate for the post of Matron is required to be not less than 21 years or not more than 40 years of age. Since, the age of the petitioner was more than 40 years (her date of birth being 21-10-1951) she did not fulfil the prescribed eligibility criteria.

9. It is further stated in the reply that since the petitioner had been working on a purely temporary basis, she can have no claim for permanent appointment to the post of Matron in view of the fact that she did not fulfil the requisite qualifications, and was not selected by the Selection Committee.

10. A rejoinder has been filed by the petitioner wherein the averments made in the petition are reiterated.

11. This Court has heard Mr.Sunil Mehta, learned counsel for Mr.S.K.Bukhari, learned counsel for the petitioner and Ms.Krina P.Callan, learned AGP for the

respondents and has perused the material on record. Mr. Sunil Mehta, learned counsel for the petitioner, has submitted that the petitioner had worked for a considerably long period of time i.e. from 1983 to 1997 and, thereafter, from 1997 upto 2001 and in this view of the matter her services should be regularised, since she is now over-age for any other employment. He has contended that when the petitioner was appointed in 1983 she was well within the age limit prescribed by the respondents. Therefore, the question of her being over-age on the date when she was interviewed by the Selection Committee i.e. 12-12-1997 should not come in the way of her regular appointment. In support of this contention, the learned counsel has placed reliance upon **State of Orissa and others v. Mamtarani Sahoo and another, (1998) 8 SCC 753** and has submitted that the relaxation of the upper age limit should be provided to the petitioner, and she should be appointed as Matron in a regular capacity.

12. Ms.Krina P.Callan, learned AGP for the respondents has submitted, that at the time when the petitioner was initially appointed on 13-5-1983, on

a purely temporary basis, no permanent post of Matron existed and therefore, there was no question of calling for her name from the Employment Exchange or applying the eligibility criteria stipulated for regular post of Matron at that point of time. Therefore, the age limit cannot be relaxed in case of the petitioner. It was further contended by the learned AGP that since the appointment of the petitioner was made on a purely ad hoc basis, as and when the lady prisoners were found in the Sub Jail, her services cannot be regularised, without following the prescribed procedure. Ms.Krina P.Calla has further emphasised that the petitioner was found unfit by a duly constituted Selection Committee as she did not fulfil the required qualifications for appointment, therefore, her prayer for regular appointment should be rejected and the writ petition be dismissed.

13. On a consideration of the averments made in the petition and the arguments advanced by the learned counsel for the petitioner, it emerges that two pleas have been raised by the petitioner for adjudication. The first plea of the petitioner is for absorption of her services on a permanent basis as Matron, which is contained in paragraph 14(a) of the petition.

Thereafter, by effecting amendment as per order dated 28-2-2001, the petitioner has raised the second plea i.e. for quashing and setting aside the order dated 8-1-2001 passed by the respondent No.1 whereby she was not selected for the regular post of Matron, and for quashing the consequential order dated 9-1-2001 whereby her services have been terminated.

14. As regards the prayer for permanent absorption of the services of the petitioner as Matron, it is relevant to keep in mind that the petitioner was appointed as Matron at the Sub Jail, Surendranagar vide order dated 13-5-1983, in the first instance, on a purely temporary basis. The said arrangement was a stop-gap one, and the services of the petitioner were only called upon, as and when there were lady prisoners present in the said Sub Jail. A perusal of the appointment order of the petitioner dated 13-5-1983 makes it very clear that her services would be discontinued at any point of time, when not required. Thereafter, the services of the petitioner were terminated with effect from 31-3-1997, which led to the filing of the present petition. As mentioned earlier, by order dated 9-5-1997 of this Court, the respondents were directed to consider the petitioner

for appointment as a Matron on a post created by the State Government and, in the meanwhile, the respondents were directed to give a suitable posting to the petitioner in the capacity of a temporary Matron at any Jail in the State. It is in the above context that the petitioner continued to work in a temporary capacity upto 9-1-2001, when her services were terminated, after being found unsuitable for appointment by the Selection Committee.

15. The question now arises whether the services of the petitioner are liable to be regularised or whether the petitioner is liable to be absorbed as Matron in a permanent capacity, for services rendered by her in a purely temporary capacity from 13-5-1983 upto 31-3-1997, and thereafter, as per the directions of this Court dated 9-5-1997 upto 9-1-2001. It has been categorically stated in both the affidavits-in-reply filed by the respondents that at the time of the initial appointment of the petitioner, no sanctioned post of Matron was available and that the petitioner had been appointed under Rule 259 of the Bombay Jail Manual, as a purely stop-gap arrangement, and in the exigency of work. The services of the petitioner were utilised only as and when lady

prisoners were brought and housed in the Sub Jail at Surendranagar. This condition has been clearly stipulated in the appointment order of the petitioner, which also states that her services are liable to be discontinued, when not required. From the above it is clear that the appointment of the petitioner was not made against any sanctioned post and neither was any due process of selection followed for making such an appointment. In this view of the matter, the prayer of the petitioner for regularization/permanent absorption as a Matron cannot be granted, since the appointment was not made against any sanctioned post nor was the prescribed procedure for selection followed.

16. The petitioner was very well aware that her appointment has been made on a temporary basis and her services were liable to be terminated, when not required. The continuance of the services of the petitioner for a long period of time, in itself, would not entitle her to be absorbed as a regular employee, de hors the Rules and procedure to be followed for the selection and appointment of a regular Matron. If the services of the petitioner are regularised, it would amount to back-door entry, at

the cost of those persons who are qualified and eligible for appointment, after following the due selection procedure. The Supreme Court, in **Secretary, State of Karnataka and others v. Umadevi (3) and others, (2006) 4 SCC 1** has made certain pertinent observations in this regard which are reproduced herein-below:

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on

the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an

interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

17. Applying the principles laid down by the Supreme Court in **Secretary, State of Karnataka and others v. Umadevi (3) and others, (Supra)** this Court is of the considered opinion that the prayer for regularization/absorption of the services of the petitioner as Matron on a permanent basis is not sustainable in law, therefore, cannot be granted.

18. The second plea raised by the petitioner is for quashing and setting aside the order dated 8-1-2001, whereby the Selection Committee had found the petitioner to be ineligible and unfit for appointment to the post of Matron since she does not fulfil the criterion of age stipulated in Notification dated 1-4-1981, and the consequential order of termination of her services dated 9-1-2001. The petitioner was

called upon to participate in the process of selection for the regular post of Matron, as directed by the order of the Court dated 9-5-1997.

19. The respondents have framed Recruitment Rules for the post of Matron under the nomenclature of the Matron (Gujarat Jail Subordinate Service) Recruitment Rules, 1981 vide notification dated 1-4-1981, in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. These Rules lay down the qualifications and eligibility criteria for appointment to the post of Matron by direct selection. According to the Rules the selection for the post of Matron should be made from amongst the woman candidates who (a) have passed standard VII and, (b) are not less than 21 years or more than 40 years of age. The petitioner was called upon to participate in the selection process and was one of the four candidates who were screened by the Selection Committee, duly constituted in this behalf, on 12-12-1997. However, since the petitioner was over 40 years of age on that date, she was not found suitable or qualified and was not selected. As a consequence thereof, the services of the petitioner, which had been continued on a temporary basis, were

terminated vide order dated 9-1-2001. In **Dalpat Abasaheb Solunke v. Dr. B.S.Mahajan, AIR 1990 SC 434**, while dealing with somewhat an identical question, the Supreme Court opined as under:

"It is needless to emphasis that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant status. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its jurisdiction."

20. In the case in hand the petitioner has not alleged any malafide against the respondents nor has pointed out any illegality or material irregularity in the selection process or in the constitution of the Selection Committee which would vitiate the selection process or would render the non-selection of the petitioner vulnerable to interference by this Court. When Recruitment rules have been framed in exercise of powers under the proviso to Article 309 of the Constitution, such Rules assume a statutory status and the recruitment, if any, made dehors the Rule would be rendered illegal and void abinitio. The Selection Committee had scrutinized the eligibility criteria of the petitioner and had rightly come to the conclusion that the petitioner did not fulfil the qualifications laid down for the post of Matron by the Recruitment Rules. This Court will not sit as an appellate authority over the Selection Committee or scrutinize the comparative merits of the candidates, including the petitioner, nor weigh the qualifications of candidates to judge their fitness for the post. This is solely the function of the Selection Committee. Since the petitioner was not found suitable for selection and appointment as she did not possess the requisite qualifications laid

down by the Rules, the order of termination of her services, cannot be faulted. When the post is to be filled up by a regularly appointed candidate, duly selected by following the prescribed procedure, who meets with the qualifications laid down by Rules, no direction can be given to continue the appointment of the petitioner, de hors the Rules.

21. The petitioner cannot be given the benefit of relaxation of the upper age limit as prayed for, since the power of relaxation is not conferred by the Rules. This Court, vide order dated 9-5-1997 directed the respondents to consider the petitioner for the post of Matron by following the prescribed procedure for selection, but did not grant any relaxation in the upper age limit in favour of the petitioner. The case of **State of Orissa and others v. Mamtarani Sahoo and another (Supra)** cited by the learned counsel for the petitioner is not at all helpful to the petitioner in this regard, as it turns on its own facts. The respondents therein were ad-hoc Headmasters/Headmistresses, who were appointed for a period of six months and were continued for a number of years and, in whose appointment, there was a term to the effect that they would continue until

regularly selected candidates were appointed to the posts in question. In that case, the point in issue was whether Administrative Instructions would hold the field on which Statutory Rules were silent. Ultimately, the Supreme Court held that the respondents would be entitled for consideration for regular appointments and the age bar would be waived if they were within the prescribed age limit at the time of initial appointment.

22. In the present case there is no conflict between Administrative Instructions and Rules, nor was the initial appointment of the petitioner made on condition that it be continued till regular selection. In the case of the present petitioner, the qualification of age, as required by the Rules, cannot be relaxed as it would amount to amending the Rules and framing new Rules, which is not the function of a Court of law.

23. For the foregoing reasons, the prayers made by the petitioner do not deserve acceptance. In the ultimate analysis, the writ petition fails, and is dismissed. Rule is discharged. There shall be no orders as to costs.

(Smt.Abhilasha Kumari,J)

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